No. 6600

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

PUGET SOUND NAVIGATION COMPANY,
a corporation,
Appellant,

vs.

HANS NELSON,
Appellee.

UPON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

Brief of Appellee

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SUBJECT INDEX

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STATEMENT OF THE CASE

The opening statement of appellant does not adequately or accurately present the essential facts necessary to an understanding of this appeal. The sufficiency of the court's instructions in this case, and the verdict of the jury, cannot be fully appreciated or understood without a more detailed statement touching

the kind and character of the "Magna's" stern light and the actual condition of natural light or darkness which prevailed at the time of the collision. It will be borne in mind in this case that at all times prior to this collision, the "Olympic" was an overtaking vessel which, under Inland Rules 23 and 24, was required to keep out of the way of the "Magna." It will, likewise, be understood that the vessel which is ahead of the other and is being overtaken, owes no duty under the law to keep a lookout astern.

THE MAGNA'S STERN LIGHT

The "Magna," of course, was required to have and maintain a stern light which would be visible to an overtaking vessel. It is admitted, in this case, that the "Magna," did not have a stern light which was sufficient to meet the technical requirements of the Motor Boat Act. The stern light on the "Magna" did not show all around the horizon, as provided by said Act. This stern light was a six volt, white, incandescent electric light, attached to the sill of the after-door of the pilot-house, suspended at a height of five feet above the "Magna's" main deck aft in the open doorway, in such manner as to show and be clearly visible from any angle aft of the beam of said vessel on each side. This light was burning brightly from the time the "Magna" left Ballard until she sank after

the collision. It was fully exposed to view from an overtaking vessel, with nothing on the after deck of the "Magna" to obstruct its view of this light. It is admitted in this case that the "Olympic" was overtaking the "Magna" on about the same course. There was not over two points difference. (Tr. 76.)

Insofar as an overtaking vessel is concerned, this light served the same purpose as the light prescribed by the Rules to warn the overtaking vessel of her presence ahead, and the mere fact that this stern light did not show ahead or forward of her beam could not possibly have made any difference in this case.

Captain Nelson, master and owner of the "Magna" who was operating and navigating his vessel alone, testified as to the location, power, kind, color and visibility of his stern light as above indicated.

In addition to the testimony given by Mr. Nelson concerning the location and place of his afterlight, and that it was within the range of vision of vessels approaching from astern, Mr. Emil F. Schuman, of Port Townsend, Washington, a passenger on the "Olympic" when the collision occurred, gave independent and disinterested testimony as to the white stern light of the "Magna." Mr. Schuman was in the cabin with his wife when the impact of collision took

place. He rushed to the "Olympic's" upper deck and saw the "Magna." He observed her masthead and side lights and after the "Olympic" had backed away from the "Magna" saw her stern light in the open door way of the after-cabin door. He positively identified this white electric light as the light Captain Nelson said was lighted and suspended from the upper sill of the door.

At page 27, Tr., Mr. Emil F. Schuman testified for the plaintiff, as follows:

> "When I got up there (referring to the upper deck of the "Olympic") I noticed the starboard light and the white light in front. The starboard light was green. At that time the "Olympic" backed up and it was getting quite dark fast, and I could see the man on board that boat."

At page 28, Tr., Mr. Schuman was asked.

> "Q. Now, as you passed the "Magna," after you stopped, or as you backed up, did you observe any other light?
>
> A. I did."

Mr. Bronson objected to this question, his objection was overruled, and he took exception. Mr. Schuman was then asked:

> "Q. What lights, if any, did you see?
>
> A. I saw a white light—"

Over Mr. Bronson's further objections and exceptions, the witness continued to give his testimony. He said in substance:

> "I saw a white light. Do you want me to state where I saw that light? It was a white light in the center of the door where you go down into the engine-room or cabin, whatever it may be, and I do not know whether there was another light in the cabin or not, and the cabin was quite lit up and I could see Mr.—what is his name, the skipper. The door was open. The light was hanging right in the center where you step down into the engine-room. At that time I could see the stern of the vessel and deck of the vessel aft of the light. That is the time when I observed when the collision occurred. Somehow or other the boat shifted around a little to the left so that she was at a four or five degree angle from the "Olympic," and I could see the crushed side. There was nothing on the stern of the boat which interfered with my vision of the light. It was a white light. It looked like an electric light. It was a little over a hundred feet, I guess, away when I saw the light. It was getting dusk then. I could not observe the light closely.
>
> The white light appeared approximately four feet above the "Magna's" main deck. I did not see more than one white light at any time when we were passing the "Magna," either the first or second time. I saw a white light and the green light on the starboard at the same time, but do not remember seeing the red light. Then, after seeing those lights, I saw the light in the door."

From the above testimony, it sufficiently appears from positive evidence, that the "Magna's stern light

was burning and was visible as claimed by Captain Nelson. We shall argue that this testimony comes within the *res gestae* rule as to what was seen and observed at the time the collision occurred and was clearly admissible as such.

We now call attention to the statement of appellant at page 5, of its brief, as follows:

> "* * * Appellee was proceeding at the time of the collision admittedly *without his after mast or any light on the after part of his boat.*"

This statement is grossly inaccurate, for the truth respecting the kind of light, its position, et cetera, appears in the record (Tr., pp. 42-43).

The only testimony in the record offered by appellant, with respect to this light is wholly negative. Appellant's master, who was on watch in the pilot-house, did not see this light. Appellant's lookout, at the time of the collision, and for four or five minutes prior thereto, was engaged in putting up the night shades, or curtains, over the windows of the saloon and passenger quarters in the fore part of the "Olympic," on her main deck, in order to keep the lights of the social hall and saloon, or observation room, from shining out forward, and thus obscuring the vision of those on watch in the pilot-house directly above the passenger quarters. Peter Garvey, the only man on lookout,

was standing about forty feet from the stem of the "Olympic," facing aft, engaged in his work, and could not from his position see the "Magna."

The "Olympic" is a large vessel which has a free-board of approximately fifteen feet above water level in the forward part of the vessel. Photographs of the "Olympic" were introduced in evidence. Plaintiff's (Appellant's) Exhibit 2, will give a very fair view of the height of the "Olympic's" pilot-house above the water, thus showing that the Pilot was looking out ahead from a place where he could not get the best view ahead. He was not standing forward in the eyes of the ship while attending to his navigation.

THE CONDITION OF NATURAL LIGHT

It was still light enough at the time of collision and for such a sufficient time before the collision, even though after sunset, for those on the "Olympic" to see an object out on the water ahead of them very clearly and for such a distance as to enable the "Olympic's" pilot and lookout to see the "Magna" very clearly if they had been attending to their duties.

At page 53, Tr., in the cross-examination of William Seatter, helmsman on the "Olympic," the following appears:

> "* * * The weather was clear. I didn't see any moon. It was dusk. It was that state between light and dark that you could see an object out of the water out ahead of you if you were looking. If there was a vessel ahead of you you could see her 1,000 feet ahead and you could see that vessel without any artificial lights before the collision."

It appears from the testimony of Mr. and Mrs. Emil F. Schuman, that it was still quite light during the two or three minutes before the collision when the "Olympic" was rapidly overtaking and about to collide with the "Magna."

Mr. and Mrs. Schuman were passengers on the "Olympic" bound from Seattle to Port Townsend. At the time of the collision they were in the cabin, and in a position to observe the condition of light and darkness.

Mrs. Schuman testified at the first trial of the case. In the interim before the second trial, Mrs. Schuman died. Her testimony given at the first trial was offered in evidence and read by Mr. R. G. Guerin, Court Reporter, at the second trial.

Mr. Schuman was with his wife in the dining room when the collision occurred and he testified that he rushed right upstairs and went upon the upper deck. We quote from the record at page 27 (Tr.):

"It did not take me over a minute to get to that point after I felt the bump. At that time it was getting dusk. It was then perhaps close to five o'clock. An object of any size I could see quite aways, say a thousand feet. At that time I would not have needed any artificial light to have seen an object 1,000 feet away on the water. * * * We backed up far enough and I could see where the port side of this fishing boat was stove in as far as the water-line. I could see a big hole there. I could see the crushed outside boards. That was in the stern."

At Tr. p. 40, Hans Nelson, appellee, said:

"At the time of the collision it was just in the twilight. It was not dark and it was not regular daylight, * * *. * * * I could see easily a half a mile on the water. I saw a towboat that was coming towing logs. I had an open window in the pilot-house. I saw the towboat coming in, and he had not had any light on at that time. I seen him first and that was before the ferry struck me. I saw the towboat through the window about a half mile away, about eight minutes before the collision."

At Tr. p. 41, he was asked:

"Q. How far could you see any vessel ahead of you, a vessel of the size of the 'Magna'?"

Mr. Bronson objected, his objection was overruled and exceptions noted.

The witness answered:

"A. You could see a vessel like the 'Magna' a quarter of a mile away, easy, at the time of that collision."

The witness further testified:

> "It was full moon. * * * It was not dark enough to see the moon at the time of the collision, * * *. At the time of the collision the sky was clear."

In cross-examination, at page 44, Tr., Captain Nelson said he could see out of his pilot-house with a light on there to navigate the vessel. He said: "I could see what I could see in the light. It was not dark. At the time of the collision you could see without lights. The light in the little room would not bother my eyes."

There was introduced in evidence on behalf of appellee, plaintiff's Exhibit 8, which was a photograph of a boat, similar in size, design, deck and pilot-house arrangement from which we have a very good general picture of the deck arrangements, place of the after-light and relative size of the two vessels.

The only testimony offered by the "Olympic" owners respecting the "Magna's" stern light at the time of collision, and for a time before collision when collision could have been avoided if the "Olympic" had taken proper steps to keep out of her way, was given by the master and the wheelsman, who were in the pilot-house navigating and steering the vessel during said period when risk of collision existed. They

testified that they did not see any stern light or any other light on the "Magna." Their place of observation was against a favorable view.

As to the condition of natural light, the master testified that the sky was overcast, and that it was quite dark. The Weather Bureau records contradicted him. Seatter, "Olympic's" helmsman, said it was clear and light enough to see without artificial light. Garvey, lookout, said it was dark when the collision occurred, but was impeached by Mr. Harry S. Redpath to the contrary.

At page 54, during the cross-examination of Garvey, who was supposed to be on lookout on the "Olympic," the following testimony was given:

> "I had my back to the bow while fixing the curtains. Before that I was on lookout looking back and forth on the bow. *It took me possibly four or five minutes to fix the curtains, to the best of my knowledge,* and during those four or five minutes I was not giving attention to looking out. It was dark at that time,—well, dusk or whatever you want to call it. It was dusk or dark. When I said dusk before the local Steamboat Inspectors I meant dark. It was not light enough to see the hull of this little vessel off on the water without the aid of artificial lights."

Peter Garvey's attention was then called to a conversation which he had with Mr. Martin and Mr. Redpath the day before the case was first tried in the Dis-

trict Court. He admitted having had a conversation with Messrs. Martin and Redpath, but denied he had made any contrary statements. At pages 90 and 91 Tr., Mr. Harry Redpath, associated with appellee's attorneys in the trial of the cause, gave the following testimony:

> "My name is Harry S. Redpath. I live in Seattle, and I am associated with the counsel for plaintiff in the practice of law in the Colman Building. Two or three days before the former trial I went down with Mr. Martin to the Colman Dock and we interviewed Mr. Garvey, the witness previously called here. He said that you could see the 'Magna' without the aid of artificial light when the 'Olympic' backed away; that the 'Olympic' backed away about half a mile, and that you could see her about a half a mile out in the water without an artificial light."

It thus appears as a statement of fact that the master of the vessel was in the pilot-house at the time attending to the navigation of his ship. That the helmsman was in the pilot-house attending to his duty in steering the ship, and that the ship was actually without a lookout. The master while testifying said: "There was nobody on lookout at the time except Mr. Garvey."

APPELLANT'S WAIVER OF RIGHT TO APPEAL—APPELLEE'S MOTION TO DISMISS THE APPEAL

The appellant recovered judgment against appellee in the sum of $312.05, for its costs of appeal when the mandate of this cause on the former appeal was entered in the District Court.

After the plaintiff, Hans Nelson had prevailed at the second trial, the jury having returned a verdict for $2500.00, in his favor, the appellant procured the Trial Court to set off the amount of its judgment for costs in the District Court in the first trial (costs of appeal on reversal), against the appellant's verdict and to enter judgment thereon for $2187.95 in the instant case.

Appellant had not theretofore pleaded counterclaim or set-off and the issue of set-off was not raised in the case until the entry of final judgment. The trial court in entering judgment for the lesser amount thereby, at the instance of the appellant, recognized the validity of the $2500.00 verdict.

The record shows that appellee tendered a proposed judgment on the verdict in the sum of $2500.00. Appellant (defendant) proposed a form of judgment for $2187.95, thus paying the older judgment in its

favor for $312.05. Appellee tendered as an amendment to the bill of exceptions, his proposed judgment for $2500.00, which amendment was duly allowed. (See Tr., pages 117 to 121, inclusive.) The court included the proposed amendment with the recital as to what took place respecting the allowance of the set-off, and certified the amendment as part of the bill.

From the foregoing recital, the record clearly shows the effort which appellee made to retain and have judgment for the amount of his verdict.

Before answering appellant's brief we urge this question of waiver, which we think concludes the case.

Appellant had a valid subsisting judgment for $312.05, against appellee as the result of the reversal on the first appeal to this Court. It had at its command the right to levy on appellee's property. But it elected to set this judgment off against the larger sum found by the jury on the trial to be due the appellee. If the larger judgment should be collected against appellant it was to its advantage to set-off the smaller judgment and thus reduce the amount of the greater judgment it had to pay. Whether properly so or not the court did set off the smaller against the larger. The test of this question is, — what became of the smaller judgment? It was not assigned, transferred or

in any manner kept alive. On the contrary it was merged and its own individual character as a judgment expunged and cancelled as against an identical sum which was also destroyed and cancelled in the larger judgment. A judgment in appellant's favor for $312.05, was thus cancelled, paid and wiped out. A similar amount was deducted from appellee's verdict of $2500.00. Appellant in claiming and taking credit for $312.05, for the cancellation and satisfaction of its own judgment thereby paid $312.05 toward a definite indivisible and entire obligation of $2500.00. It thereby recognized the validity of Mr. Nelson's (appellee's) verdict upon which a judgment should issue in a like sum and satisfied its own claim against Nelson in that sum.

Appellee's judgment could never be $2500.00, on the verdict in his favor, but only $2187.95, and the $312.05 judgment could not again come to life and be operative and have the qualities of a valid judgment, for it no longer existed. Could appellant now revive its judgment and pursue its remedy of levy and execution sale against Mr. Nelson's property if a new trial should be held and a jury should return a verdict against the appellee? Could it be heard to say that its judgment had come to life again? This seems to answer the question in our favor. If the verdict was

valid and sufficient to permit a valid set-off to the extent of $312.05, it must be held valid for all purposes, for it could not be divided or apportioned. If valid for a set-off it must be valid for all purposes. Hence, an estoppel was established. See *Kansas City, etc. R. Co., vs. Murray,* 57 Kan. 697, 47 Pac. 835, from which we quote the following:

> "DOSTER, C. J. This is the second time this case has been brought to this court by the plaintiff in error. In both instances the proceeding was based upon a judgment for damages for bodily injuries. Upon the hearing of the first case the judgment was reversed, and a new trial ordered. *Railroad Co. vs. Murray,* 55 Kan. 336, 40 Pac. 646. The order of reversal included a judgment against the defendant in error and in favor of the plaintiff in error for $54.40, the costs of this court. * * * Upon a second trial of the case a verdict was again returned against plaintiff in error (defendant below), and after the overruling of its motion for a new trial, and the rendition against it of the judgment which is now in question, it moved the court below for an offset against such judgment of the judgment for costs which it had formerly recovered in this court against the plaintiff, now defendant in error. To this the defendant in error consented. The credit or offset was thereupon allowed, and the judgment satisfied *pro tanto.* The defendant in error now moves for a dismissal of the case from this court upon the ground that such demand for credit on the judgment, the allowance of the same, and the consequent partial satisfaction of such judgment, was such a recognition of its validity and justice as to constitute a waiver of the right to prosecute error

therefrom. The plaintiff in error contends against this motion, because, as it says, the rule of estoppel applies only in cases where the complaining party has accepted some benefit under the judgment against him, and constituting a part of the same; that, inasmuch as the judgment it asked to offset, and for which it received credit on the judgment below, was in no wise connected therewith, but evidenced a right counter to such judgment, and not a right under the same, it should not be held to have waived its right to prosecute error from the unpaid residue; and it also contends that, in the event of a reversal of the case in this court, the judgment complained of would be vacated, and, per consequence, the order to offset and partial satisfaction, which would fully restore to the parties their former rights; and, furthermore, that the defendant in error, having consented to the offset and partial satisfaction, should not now be heard to urge that which he agreed to as a reason for denying the claim of error. *None of these reasons in resistance to the motion to dismiss appear sound.* If the motion for offset and partial satisfaction and the order allowing the same, would of themselves constitute a waiver of the errors complained of, their effect could not be neutralized by the plaintiff's consent thereto. So far as the compensation *pro tanto* of one judgment by the other is concerned, the law required the same, and the plaintiff was compelled to submit thereto, whether he consented or not. His consent to the order of offset and satisfaction is no estoppel upon his right to urge a dismissal of the case, because the law imposed the obligation upon him without his consent. *Turner vs. Crawford,* 14 Kan. 499; *Read vs. Jeffries,* 16 Kan. 534; *Herman vs. Miller,* 17 Kan. 328. It may be granted that the effect of a reversal of the case by this court would

be to vacate the judgment complained of, and to restore the other one to its condition as a valid subsisting claim; but the question does not relate to the effect of its reversal as an erroneous or unjust judgment, but to the effect of its recognition by plaintiff in error as a just and valid judgment. It may also be admitted that to ask and obtain the credit or the offset against the judgment was not the acceptance of a benefit under such judgment, and which formed a constituent part of the same. *It was, however, an admission of its validity and justice, an acceptance of the same as right and proper, an abandonment of further contest over the dispute.* No one can make payment upon a demand against him, entire and indivisible in character as this judgment, without being taken to admit it as a just and indisputable claim. Upon no other ground can the doctrine of waiver by voluntary payment be rested. The credit or offset was, in legal contemplation, a payment on the judgment, as much so as if it had been made in money. It was the parting by the plaintiff with a thing of value, and its application towards the satisfaction of a legal demand. The fact, if it be such, that the plaintiff below (the defendant in error here), was and is insolvent, as suggested by counsel, does not alter the legal rule. We cannot frame an issue in this case to determine the charge of insolvency. Except in cases where that can be properly done, the law will esteem the judgment as valuable.

* * * No one in a legal controversy can be heard to say to his adversary: 'Your judgment against me is erroneous and unjust, and my purpose is to demonstrate such to be the case to the appellate courts; but nevertheless I will pay off a portion of it'; or will be heard to say: 'I demand that you accept from me, as a credit on your er-

roneous and unjust judgment, what you owe me in respect of another account.' * * * In the case at bar the sum of $54.40, the portion of the plaintiff's judgment which the defendant demanded should be satisfied by the offset of its claim to that amount, was in controversy. The defendant denied throughout the trial that it owed that sum, or any sum whatever. The sum was in inseparable portion of the entire judgment; and a recognition of the validity and binding force of that portion of such judgment cannot in law be regarded otherwise than as a recognition of the validity and binding force of the whole. Whosover litigates a claim, and, being defeated, pays the judgment, or surrenders the subject-matter of the controversy, waives his right to prosecute error therefrom. *State vs. Conkling,* 54 Kan. 108, 37 Pac. 992; *Fenlon v. Goodwin,* 35 Kan. 123, 10 Pac. 553. It is no answer to say that in these cases the entire judgment was paid, or the whole subject of controversy surrendered. There is no difference in principle between paying all or a part, or surrendering all or a part, of a legally entire and indivisible thing. * * *

We are quite clear the petition in error should be dismissed, and it is so ordered."

In the case of *In re Minot Auto Co., Inc.,* 298 Fed. 853, C. C. A. 8 Cir. (1924), the Circuit Court of Appeals say:

"Counsel for the respondent maintain that the petitioner, having received and retained the full amount awarded to it by the order of the referee, has waived its right to have the order in question reviewed. The rule is well settled that one cannot accept a benefit under a judgment, and then ap-

peal from it, when the effect of the appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot be affected by the reversal of the judgment. *Embry vs. Palmer,* 107 U. S. 3, 8, 2 Sup. Ct. 25, 27 L. Ed. 346; *Gilfillan vs. McKee,* 159 U. S. 303, 311, 16 Sup. Ct. 6, 40 L. Ed. 161; *Albright vs. Oyster* (C. C. A. 8) 60 Fed. 644, 9 C. C. A. 173; *Worthington vs. Beeman* (C. C. A. 7) 91 Fed. 232, 33 C. C. A. 475; *Chase vs. Driver* (C. C. A. 8) 92 Fed. 780, 34 C. C. A. 668; *In re Letson* (C. C. A. 8) 157 Fed. 78, 84 C. C. A. 582; *Carson Lumber Co. vs. St. Louis & F. R. Co.* (C. C. A. 8) 209 Fed. 191, 126 C. C. A. 139; *Peck vs. Richter* (C. C. A. 8) 217 Fed. 880, 133 C. C. A. 590."

See, also, *Carson Lumber Co. vs. St. Louis & S. F. R. Co.,* 209 Fed. 191, at 193, (C. C. A. 8):

> "It is undoubtedly the general rule that a party who obtains the benefit of an order or judgment, and accepts the benefit or receives the advantage, shall be afterwards precluded from asking that the order or judgment be reviewed."

In the case of *Albright et al vs. Oyster, et al,* (C. C. A. 8, 1894), 60 Fed. 644, we quote from the syllabus the following:

> "APPEAL—RIGHT TO APPEAL—ESTOPPEL.
>
> Parties who, pursuant to the provisions of a decree, demand and receive a conveyance of lands from a trustee, are thereby estopped from appealing from the decree; for they cannot accept its benefits, and at the same time have a review in respect to its burdens."

The Velma L. Hamlin (C. C. A., 4th, 1930), 40 Fed. (2) 852, 855:

"* * * For, except in the case where a judgment or decree represents an uncontroverted part of a demand, the ordinary rule is that one who accepts payment thereof will not be heard to question its correctness by appeal. 3 *C. J.* 681; 2 *R. C.* L. 63; Notes 45 *Am. St. Rep.* 271, and cases cited; *Ann. Cas.* 1914 C., 301."

West vs. Broadwell (Ore. 1928) 265 Pac. 783:

"A defeated litigant cannot accept a part of the benefits of the judgment and appeal from the remainder. He cannot accept and acquiesce in a part of the judgment and appeal from the remainder. This was expressly held to apply to costs and disbursements in *Moore vs. Floyd,* 4 Ore. 260, 261. This case was decided in 1872, and this court has adhered consistently to that principle ever since."

Winsor vs. Schaeffer (Mo. App.) 34 S. W. (2) 989:

"One cannot accept of, or acquiesce in judgment, and at same time appeal therefrom."

Nat'l. Bank of Summers of Hinton vs. Barton (W. Va.) 155 S. E. 907:

"Party may not appeal from decree under which he enjoys benefits inconsistent with appeal."

2 Cyc. 656:

"An act on the part of a defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it."

Smith vs. Smith (Okla. 1925), 236, Pac. 578 at 580-1:

> "Can a man thus blow hot and cold at the same time? Can he question the correctness and validity of a judgment for one purpose while asserting its validity and binding force for another purpose? The case of the *City of Lawton vs. Ayres,* 40 Okla. 524, 139 P. 963, appears to be directly in point and decisive of the question presented by this motion to dismiss. In that case Ayres had recovered judgment against the City of Lawton, from which judgment the City of Lawton prosecuted proceedings in error to this court. On the motion to dismiss the appeal it appeared that subsequent to the rendition of the judgment against it the city of Lawton commenced proceedings for the purpose of funding certain warrant and judgment indebtedness, and among the judgments listed in said proceeding as an outstanding indebtedness against the city was the Ayres judgment. Justice Kane, in passing upon the motion to dismiss, said:
>
> 'The contention of the movant is that this proceeding constitutes a recognition on the part of the city of the validity of the judgment rendered against it, and a waiver of its right to appeal therefrom or to bring error to reverse it; we think this position is well taken. The rule is "that any act on the part of the defendant by which he impliedly recognized the validity of a judgment against him operates as a waiver to appeal therefrom, or to bring error to reverse it." 2 *Cyc.* 656. It is difficult to conceive a more solemn recognition by a municipality of the validity of a judgment rendered against it than is involved in a proceeding to find the same, under our statute.' "

State vs. Masse (S. C. Kan. 1913), 132 Pac. 1182:

> *Held*: Payment of costs bar to appeal. "The rule rests upon the recognition of the judgment as valid. *R. R. Co. vs. Murray,* 57 Kan. 697, 47 Pac. 835; 12 Cyc. 807, 808. This recognition is shown *by partial, as well as by full,* compliance. A judgment in such a case could not be valid, as to costs and invalid as to fine and imprisonment."

Party accepting benefits of part of judgment waives right of appeal as to unfavorable part thereof.

> *Pickering Lbr. Co. vs. Harris* (Okla.) 283 P. 563, 140 Okla. 303;
>
> *McLachlan vs. McLachlan,* (Cal. App.) 276 P. 627.

Acceptance of attorney fee in action to set aside former judgment construing will was waiver of right to appeal.

> *Fadely vs. Fadely* (Kan.) 276 P. 826, 128 Kan. 287.

Appellant's affidavit showing settlement of judgment appealed from, insofar as it related to costs, *held,* to require dismissal of appeal.

> *West vs. Broadwell* (Oregon) 265 P. 783, 124 Ore. 652.

3 *Corpus Juris* 669, Section 542:

> "As a general rule any act on the part of a party by which he expressly or impliedly recognizes the validity of a judgment, order, or decree against him *operates as a waiver of his right to appeal therefrom* or to bring error to reverse it."

The case of *Kansas City, etc. R. Co. vs. Murray,* 47 Pac. 835, has been cited with approval in the following cases:

Fidelity & Deposit Co. of Md. vs. Kepley (Kan. 1903) 71 Pac. 819;

Seaverns vs. State (Kan. 1907), 93 Pac. 164;

Elevert vs. Marley (Ore. 1909) 99 Pac. 888;

State vs. Masse (Kan. 1913) 132 Pac. 1183;

Smith vs. Smith (Okla. 1925) 236 Pac. 581.

Kansas City, etc. Ry. vs. Murray, supra, is exactly and squarely in point on identical facts. There as here the appellant had set off a judgment for costs on a former appeal. The setoff was against a total and indivisible greater sum.

On the foregoing authorities and the record in this case, appellee moves to dismiss the appeal.

REPLY TO APPELLANT'S ARGUMENT ON SPECIFICATIONS OF ERROR

SPECIFICATION NO. I.

As its first specification of error, appellant contends that the court erred in admitting in evidence the testimony of Emil F. Schuman as to the visibility of the light in the cabin or pilot-house of the "Magna," immediately after the collision. Clearly appellant's position with respect to this testimony is un-

founded, as said testimony is unquestionably admissible upon several grounds.

Captain Nelson, owner and master of the "Magna," described the arrangement, position and brilliancy of this stern light, and testified that there were no obstructions on the after part of the "Magna" to prevent an overtaking vessel from seeing this light if maintaining any lookout.

Emil F. Schuman, a passenger on board the "Olympic" at the time of the collision, testified that, as soon as the "Olympic" struck the "Magna," he *rushed* over to the window of the lower cabin where he was having lunch but could not see anything, so he *rushed* right upstairs to the upper deck, which did not take over a minute after the impact of collision. (Tr. 26, 27.) At the time he reached the upper deck, the "Olympic" was backing up, passing the "Magna" a couple of blocks before she stopped. The witness was then asked what, if any, lights of the "Magna" he observed from the deck of the "Olympic" as the latter vessel passed the "Magna" after backing up. Mr. Schuman testified as follows (Tr. 29, 30):

> "I saw a white light. Do you want me to state where I saw that light? It was a white light in the center of the door where you go down into the engine-room or cabin, whatever it may be, and I do not know whether there was another light in

the cabin or not, and the cabin was quite lit up and I could see Mr.—what is his name, the skipper. The door was open. The light was hanging right in the center where you step down into the engine-room. At that time I could see the stern of the vessel and deck of the vessel aft of the light. That is the time when I observed when the collision occurred. Somehow or other the boat shifted around a little to the left so that she was at a four or five degree angle from the "Olympic," and I could see the crushed side. *There was nothing on the stern of the boat which interfered with my vision of the light.* It was a white light. It looked like an electric light. It was a little over a hundred feet, I guess, away when I saw the light. It was getting dusk then. I could not observe the light closely. The white light appeared approximately four feet above the "Magna's" main deck. I did not see more than one white light at any time when we were passing the "Magna," either the first or second time. I saw a white light and the green light on the starboard at the same time, but do not remember seeing the red light. Then, after seeing those lights, I saw the light in the door."

Unquestionably, this testimony was admissible upon the following grounds and for the following reasons:

(1). These observations, having taken place immediately (about one minute) after the impact of collision, are part of the *res gestae.*

> "Facts as well as declarations may form parts of the *res gestae,* and be admissible for that reason, * * *." (10 R. C. L. 982, Sec. 164.)

(2). This testimony surely corroborates Captain Nelson relative to the existence of said stern light; the location thereof in the door-way of the pilot-house, facing aft; the brilliancy thereof; and the fact that there were no obstructions on the after deck of the "Magna."

(3). Irrespective of its corroborative value, this testimony clearly establishes the facts set forth in the last preceding paragraph.

If it appears that the physical condition afterwards is the same as at the time of the accident its condition after the accident may always be shown. This court has recognized this rule in numerous cases.

See: *Alaska S. S. Co. vs. Katzeek,* 16 Fed. (2d) 210, where Judge Gilbert said, at page 211:

> "This is not a case where evidence of a similar accident was introduced to prove the negligence of the defendant in the particular act declared upon. *Here the purpose of the evidence was to show that immediately after the accident the conditions had not changed and that the tackle used by the defendant was defective.* By the decided weight of authority evidence of similar accidents may be adduced, when it is given only to illustrate a physical fact before or after the occurrence which is under investigation and the conditions of that occurrence." Citing numerous cases.

See, also, *O'Brien vs. Las Vegas & T. R. Co.,* 242 Fed. 850, where Judge Gilbert in speaking for this Court at page 852 says:

> "Where, in an action for personal injuries, the condition of machinery, appliances, or places for work, as they appeared within a reasonable time after the accident, warrants an inference as to the conditions existing at the time of the accident, such condition may be given in evidence."
>
> Citing 26 *Cyc.,* 1427, and many other cases.

SPECIFICATION II.

Next, appellant specifies error upon the court's admitting testimony of the appellee as to the visibility of the stern light of the "Magna," at times prior to the day of the collision (appellant's Brief, pp. 28-31).

Counsel for appellant, in his argument upon this specification of error, seems to us to take a decidedly inconsistent and ridiculous position, viz: That the burden is upon the appellee to prove that his failure to have a stern light on his vessel exactly as prescribed by the Rules *could not* have contributed to the collision; yet that the appellee should be precluded from introducing any testimony tending to prove such issue. (Appellant's Brief, p. 30.)

After the appellee had testified as to the location of the six volt electric light hanging in the doorway

of the after part of the pilothouse, about five feet above the main deck, showing aft, with the said door open at and prior to the collision, he was asked if this light was visible to one approaching from the stern. To this question he answered "Yes." He then testified that he had had occasion before the collision to be away from this vessel at night-time when he could see this light suspended in the doorway of the cabin of the "Magna;" that he had been on shore many times, and had seen that light burning half a mile away. (Tr. 39.)

This testimony is clearly admissible as competent proof upon one of the most important issues of the case, to-wit: Could this light have been seen by the officers of the "Olympic?" If Hans Nelson could see this very same light a half a mile away, surely Peter Garvey, the lookout of the "Olympic" could have seen it in time to have avoided this collision if he had been attending to his duties as lookout instead of fixing the curtains of the forward cabin with his back turned to the bow of the "Olympic" for four or five minutes immediately prior to the collision. According to the testimony of Van Bogaert, master of the "Olympic," no one else except Peter Garvey was on lookout. (Tr. 81.)

The only testimony given by Van Bogaert, master of the "Olympic," concerning the stern light of the "Magna" was that he *did not see it,* and not that "no light was visible upon the appellee's boat at any time prior to the collision," as counsel for appellant would have the court believe from his brief. (p. 30.) The law is too well settled for argument that the master in the pilot-house in charge of the navigation of his vessel, or the wheelsman steering the vessel, are not sufficient lookouts. It is not their duty. They were stationed in the pilot-house, the floor of which was about 27 feet above the water, and about 25 feet from the bow of the vessel. The place for the lookout, as set forth in innumerable decisions, is in the "eyes of the ship" as close to the water as possible. The courts, also, hold that testimony of the watch officers in the pilot-house that they did "not see the lights" of a vessel they are overtaking, is not proof that the lights were not burning. This is entirely consistent with the positive testimony of witnesses from the other vessel that their running lights *were burning.* See *The Buenos Aires* (C.C.A. 2, 1924), 5 Fed. (2d) 425, and cases therein cited. The positive testimony of those on the overtaken vessel that their lights were burning, being in a position to see the lights and know their condition, will not be lightly rejected because other persons, whose

duty it was to have seen them, either failed to observe, or happened not to see them. Negative evidence of this character cannot be accepted to outweigh positive evidence. The failure to observe a light cannot be said to disprove its existence.

See: *The Buenos Aires* (C.C.A-2), 5 Fed. (2d) 425, 430;

The Fin MacCool (C.C.A.-2), 147 Fed. 123;

Horn vs. Baltimore & Ohio R. Co. (C.C.A.-6), 54 Fed. 301;

Rhodes vs. U. S. (C.C.A.-8), 79 Fed. 740;

Stitt vs. Huidekoper, 17 Wall. 393, 21 L. Ed. 644.

SPECIFICATION NO. III.

For this specification, appellant assigns error upon the court's denial of appellant's motions for a directed verdict. (Appellant's Brief, p. 21.) In his argument on this specification of error, counsel's only basis for his contention is that the appellee was guilty of contributory negligence as a matter of law. (Appellant's Brief, p. 31.)

Appellant lays great stress on the fact that because the stern light of the "Magna" was not visible all around the horizon that the case should have been taken from the jury on the motion for non-suit.

Breach of statutory duty is not important if the breach did not and could not have contributed to the collision. The mere failure to show all around the horizon could not possibly have affected a vessel coming up from astern almost dead aft. The failure of this light to show forward of the beam and to shed its rays in the forward hemisphere of the vessel, viz., from the beam on one side, around forward through the arc of the half circle to the beam on the other side, could not possibly have helped the overtaking vessel. We call the court's attention to the navigation lights which are required by the International Rules, for an ocean going vessel. The stern light shall only show through 135 degrees, from 2 points abaft the beam on one side, around the stern to a place 2 points abaft the beam on the other side. The ocean going vessel is not required to have a range light, the function of which is to have two white lights at the mast heads so that when vessels are on meeting or are travelling upon crossing courses the range of the lights as they open and close will more accurately show the exact course of the approaching vessels. The range light serves no purpose when a vessel is overtaking another from aft or nearly aft on the same course. On these facts, assuming that Captain Nelson was telling the truth about his stern light, it is idle to say that be-

cause this particular stern light did not shed its rays outward from the fore part of the "Magna" so as to have been seen by a vessel approaching the "Magna" on a meeting or crossing course, that such failure could possibly have affected the "Olympic" coming up astern.

Appellant's argument supporting his third specification wholly disregarded the matter of the natural light of day. The "Magna" was in plain view out on the water ahead of the "Olympic." If they saw what Emil F. Schuman and his wife easily observed, viz., the hull of the "Magna" out on the water several hundred feet away from the "Olympic" at a time after the collision, the jury, believing them, could easily have found that the presence or absence of a light on board the "Magna" had nothing at all to do with seeing the "Magna" if those on board had been attending to their duties. We know the lookout on the "Olympic" was not attending to his duty. We know the wheelsman could not have done his duty steering the vessel if he had spent his time trying to do what the lookout, Garvey, was employed to do. And the master's failure to see the "Magna" in the twilight could easily have been explained by the fact that he was engaged in checking his courses or attending to his navigation

and did not see what he readily could and should have seen.

Counsel for appellant cites at great length from this court's previous decision in this case, which is undoubtedly the rule of law herein. In its previous decision, this court, following *Belden vs. Chase,* held that contributory negligence is a complete defense. Counsel's argument upon this specification may very well have been a fitting argument to have been presented to the jury. In fact, it is the *very argument* Mr. Bronson did make to the jury. But the jury, by their verdict, refused to accept Mr. Bronson's statements as to the facts of the case. He is now attempting to place the same argument before this court in an extreme effort to so cloud the issues in such a manner as to have the court accept his version of the case, irrespective of the testimony adduced by the appellees.

We contend that there was ample evidence to support the verdict of the jury, and for that reason appellant's motions for a directed verdict should have been overruled.

We shall not burden the court with restating the evidence in support of appellee's cause of action, but only refer to the same as set forth at some length at the opening of this brief. We respectfully submit

that, from this testimony, it amply appears not only that for all practical purposes the stern light of the "Magna" was sufficient; but, also, that the natural light of day was such that the "Magna" would have easily been seen by the officers and lookout of the "Olympic" if they had been attentive to looking out.

SPECIFICATION NO. IV.

Appellant assigns error upon the court's refusal to give the specific instructions requested by it. (Appellant's brief, pp. 34-39.)

Appellant's first requested instruction, for the failure to give which error is now assigned, merely sets forth the prescribed lights, and then closes with the instruction that the failure of the "Magna" to carry the stern light as prescribed by the Act was a fault sufficient to fix plaintiff (appellee) with at least contributory fault for the collision, requiring the jury to return a verdict for the defendant unless the jury should find that the failure to carry such white light aft to show all around the horizon, by the "Magna," *could not have* been one of the causes of the collision.

The trial court did instruct the jury very fully and accurately regarding the prescribed lights for the "Magna." (Tr. 96-98.) *In this instruction, the court*

put particular emphasis upon the white light aft to show all around the horizon. (Tr. 97.)

At Tr. 102, the court very clearly and emphatically instructed the jury as follows:

> "Now, Lady and Gentlemen of the Jury, the law is, with respect to this light, that if it is not in the place and the kind of a light which the law requires it to be, if a collision occurs, it imposes the burden upon the plaintiff to satisfy you that the light differing from the light established by law could not have been any part of the cause of the collision."

Again at Tr. 112, *the court read to the jury, word for word, the written instruction prepared and requested by Mr. Bronson regarding contributory negligence as being a complete bar*:

> "Under the facts in this case, the failure of the 'Magna' to carry the prescribed white light aft to show all around the horizon, is a fault sufficient to fix the plaintiff with at least contributing fault for the collision between the vessels and consequent loss and damage, if any, suffered by the plaintiff, requiring you to return a verdict for the defendant, unless you shall find that the failure to carry a white light aft to show all around the horizon, by the 'Magna', could not have been one of the causes of the collision by this defendant vessel following from behind."

We submit that these instructions meet every requirement of the previous decision of this court upon this phase of the case.

Regarding appellant's requested instruction that the officers of the "Olympic" had a right to assume that no vessel was ahead, we submit that this general matter was properly submitted to the jury under instructions relating to burden of proof. The specific instruction requested is obviously incorrect in that the proof of all of the witnesses testifying upon the subject was that the "Olympic" had no lookout whatsoever for a period of four or five minutes before the collision. The master of the "Olympic" very frankly admitted that the only one on lookout was Peter Garvey, who was engaged with his back turned to the bow of the "Olympic" fixing curtains for four or five minutes immediately preceding the collision. To have given the instruction requested (appellant's brief, pp. 36-37) would have been equivalent to putting the court's "stamp of approval" upon a ferry boat such as the "Olympic" travelling in congested waters without any lookout whatsoever. Such would have been, in effect, to have overruled every decision upon the subject of competent and attentive lookouts.

SPECIFICATION NO. V.

As its fifth specification, appellant assigns error upon the instructions as given by the court. (Appellant's brief, pp. 39-54.)

Since the instructions should be construed in their entirety, it seems grossly unfair that Mr. Bronson, for the appellant, should omit in his brief the correct instructions upon the phase of the case to which he is most strenuously objecting and assigning error, viz: The effect of appellee's failure to carry a stern light, as prescribed by the Rules, to show all around the horizon.

In replying to counsel's argument on specification No. IV, we set forth the court's instructions upon this issue of the case, in which he advises the jury, in no uncertain terms, that in order to find for the plaintiff (appellee) they must find that the failure of the plaintiff to carry the prescribed range light not only *did not* but *could not* have contributed to the collision.

Mr. Bronson, at the conclusion of the court's charge to the jury, took an exception to the court's failure to fully instruct the jury upon this issue of the case, whereupon the court immediately corrected any misstatement or omission relative to the effect of contributory negligence by reading to the jury the identical instruction prepared and requested by Mr. Bronson as follows (Tr. 112):

> "Under the facts in this case, the failure of the 'Magna' to carry the prescribed white light aft to show all around the horizon, is a fault suffi-

cient to fix the plaintiff with at least contributing fault for the collision between the vessels and consequent loss and damage, if any, suffered by the plaintiff, requiring you to return a verdict for the defendant, unless you shall find that the failure to carry a white light aft to show all around the horizon, by the 'Magna,' could not have been one of the causes of the collision by this defendant vessel following from behind."

We do not find it necessary to take issue with Mr. Bronson concerning the numerous cases cited in his brief upon this point, as we are governed by the previous decision of this court upon the former appeal of this case. And we respectfully submit that the instructions given by the court meet every requirement of said decision. The court, upon the second trial, placed the burden squarely upon the shoulders of appellee (plaintiff) to prove that his failure to carry the prescribed range light not only *did not* but *could not* have contributed to the collision.

In order that there may be no doubt concerning the law relative to the court's power to correct his instructions, we call attention to the recent case of *Anthony O'Boyle vs. Northwestern Fire & Marine Ins. Co.* (C.C.A.-2), 1931 A.M.C. 1385, where it was held that in an action on a policy of marine insurance, where the court erroneously charges the jury in regard to the burden of proof, but subsequently, and

before the jury had finished its deliberations, corrected the charge and properly instructed them, such previous error is cured and the defendant has no complain upon appeal.

The cases cited by appellant merely serve as a digest upon the matter, not inconsistent with said previous decision of this court. This being a trial at law before a jury (as distinguished from the admiralty cases cited by appellant), the question as to whether the failure of appellee (plaintiff) to provide the "Magna" with the prescribed stern light *could have contributed to the collision* is a matter to be presented to the jury under proper instructions, which, we submit, was done in this case.

SPECIFICATION NO. VI.

Finally, counsel for appellant assigns error upon the instruction given by the court pertaining to "negative vs. positive" testimony. (Appellant's brief, pp. 54-55.)

In this case, Hans Nelson, the appellee, testified *positively* that his stern light was burning brightly at the time of the collision, and had been burning brightly since leaving Ballard. He testified *positively* regarding the location of this light, its brilliancy, and the visibility thereof from an overtaking vessel. Emil

F. Schuman testified *positively* that he saw this light from the deck of the "Olympic" *immediately* after the collision. As against this *positive* testimony regarding this stern light, we have the *negative* testimony of the master and wheelsman of the "Olympic" that they *did not see this stern light.*

In view of this testimony, the court very properly instructed the jury that positive testimony of this nature is entitled to more weight generally than negative testimony that a witness "did not see it." The court further instructed the jury that it was for them to say whether this rule of law was applicable in this case.

The law is too well settled to admit argument that "positive evidence that lights were burning brightly *will* ordinarily outweigh negative testimony that lights were not seen.

See: *"Annie"-"Commonwealth,"* (D. Alaska), 1928 A.M.C. 1114;

"Annie"-Commonwealth," (C.C.A.-9), 1930 A. M.C. 38, 36 Fed. (2d) 581;

"Gillen"-"Van Dyck," (D.C.-E.D.-N.Y.) 1929 A.M.C. 1358;

"Lakewood"-"Mohegan," (C.C.A.-2) 1928 A. M.C. 1759;

"Columbia F. C., (C.C.A.-4) 1928 A.M.C. 1211, 26 Fed. (2d) 583;

"Hendrick Hudson"-"Juliette," (D.C.-E.D.-N. Y.) 1928 A.M.C. 428;

"Socony No. 14"-*"Worthington"* (E.D.-N.Y.) 1928 A.M.C. 1361;

"The Buenos Aires" (C.C.A.-2-1924), 5 Fed. (2d) 425;

"The Fin MacCool," (C.C.A.-2, 1906) 147 Fed. 123;

"Skanstad"-"Lake Charles," 1929, A.M.C. 148.

In the case of *"The Buenos Aires," supra,* the Circuit Court of Appeals for the Second Circuit, in quoting from *"The Fin MacCool," supra,* holds as follows: (5 Fed. (2d) at p. 430.)

> "We again call attention to what this court said in *The Fin MacCool,* 147 F. 123, 77 C.C.A. 349, where we remarked as follows:
>
> 'The case is one for the application of the rule of evidence that positive evidence is ordinarily to prevail over strictly negative evidence, and that when one or more witnesses testify that they saw an object or heard a signal upon a given occasion, their testimony is to prevail over that of a same number of witnesses, of equal candor, who testify that they did not see or heard it. There is, in such cases, no necessary conflict of evidence as to the fact in question. The observation of the fact by some of the witnesses may be entirely consistent with the failure of the others to observe it, or their forgetfulness of its occurrence. *Horn vs. Balt. & Ohio R. Co.,* 54 F. 301, 4 C.C.A. 346, 351; *Rhodes vs. U. S.,* 79 F. 740, 21 L.

> Ed. 644, 25 C.C.A. 186; *Stitt vs. Huidekoper,* 17 Wall. 393. Of course, in each case the opportunities of observation, and the interest prompting the witnesses to attentive observation are to be considered; and the rule referred to is not inexorable, but is to be applied with due regard to the circumstances of the particular case. The whole subject is excellently treated in 17 Cyc. pp. 801-803, where all the authorities are collected'."

In *"Annie"-"Commonwealth"* (Booth Fisheries Co, vs. Hans Danielson) *supra,* this court remarked as follows (1930 A.M.C. 38, at 39):

> "The two witnesses on board the Annie at the time of the collision testified that her lights were burning brightly. Three witnesses on board the Commonwealth testified that they saw no lights. The former testimony was positive and the latter negative in its character. The testimony was taken largely in open court, and the finding of the court, based on conflicting testimony, if there was such conflict, should not be disturbed. And if the lights on the Annie were burning brightly as found by the court, it follows almost as a matter of course that the Commonwealth did not maintain a sufficient lookout, or that the lookout did not attend properly to his duties. *New York,* 175 U. S. 187, 204."

In conclusion, it is respectfully submitted that the appellant has been accorded a fair and proper trial in this case. It is further submitted that there is ample testimony in the record to support the verdict of the

jury, and that the instructions given by the court were in entire accordance with the previous decision of the court upon the former appeal. It is therefore earnestly urged that this appeal be dismissed.

Respectfully submitted,

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